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**Ivey Air, Inc. and Sheet Metal Workers' International Association, Local 19, AFL-CIO. Case 4-CA-32387**

January 12, 2004

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND WALSH

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 26, 2003, the General Counsel issued the complaint on September 25, 2003, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 4-RC-20476. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 19, 2003, the General Counsel filed a Motion for Summary Judgment. On November 24, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The Respondent admits that it has refused to bargain with the Union, but contests the validity of the certification based on its objection to the election in the representation proceeding.<sup>1</sup>

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<sup>1</sup> The Respondent, in its answer, denies that the certified unit is appropriate, and denies that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. However, the Respondent did not request review of the Regional Director's Decision and Direction of Election finding the unit to be appropriate and the Union to be a statutory labor organization, and it is now precluded from disputing these findings. See *University of Rio Grande*, 325 NLRB 642 (1998). Any questions regarding these matters could and should have been raised in the representation proceeding. See *Chardon Rubber Co.*, 335 NLRB 1189 fn. 1 (2001), enf. 2003 WL 22905328 (6th Cir. Nov. 21, 2003) (unpublished). Accordingly, we find that the Respondent's denials in its answer have not raised any issue warranting a hearing in this proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, a Pennsylvania corporation with a facility in Levittown, Pennsylvania, has been engaged in performing commercial and residential heating, air conditioning, and sheet metal installation services. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, received in excess of \$50,000 for its commercial heating, air conditioning, and sheet metal services performed outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following the election held September 20, 2002, the Union was certified on October 30, 2002, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time sheet metal mechanics and helpers employed by Ivey Air, Inc., excluding all other employees, estimators, office managers, office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

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<sup>2</sup> Chairman Battista did not participate in the underlying representation proceeding. He agrees, however, that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding, and that summary judgment is therefore appropriate.

### B. Refusal to Bargain

On or about March 13, 2003, the Union, by letter, requested the Respondent to bargain, and, since on or about March 13, 2003, the Respondent has failed and refused to do so. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

### CONCLUSION OF LAW

By failing and refusing on and after March 13, 2003, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

### ORDER

The National Labor Relations Board orders that the Respondent, Ivey Air, Inc., Levittown, Pennsylvania, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Refusing to bargain with Sheet Metal Workers' International Association, Local 19, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time sheet metal mechanics and helpers employed by Ivey Air, Inc., excluding all other employees, estimators, office managers, office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Levittown, Pennsylvania, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 13, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 12, 2004

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Sheet Metal Workers' International Association, Local 19, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time sheet metal mechanics and helpers employed by us, excluding all other employees, estimators, office managers, office clerical employees, guards and supervisors as defined in the Act.

IVEY AIR, INC.